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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re David Abreu

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Serial No. 78211766

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Caroline H. Mead of Squire Sanders & Dempsey LLP for David Abreu.

Patricia Evanko, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

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Before Quinn, Walters and Zervas, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

David Abreu filed, on February 6, 2003, an application to register on the Principal Register the mark ABREU VINEYARDS CAPPELLA for "wine" in International Class 33. The application is based on applicant's assertion of a bona fide intention to use the mark in commerce.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of

the previously registered mark CAPELLA for "wine and liqueur" in International Class 33.<sup>1</sup>

Applicant has appealed the final refusal of its application. Both applicant and the examining attorney have filed briefs, but applicant did not request an oral hearing. As discussed below, the refusal to register is affirmed.

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first turn to the goods involved in this case. Applicant's goods are in part identical to registrant's

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<sup>1</sup> Registration No. 1576703, issued January 9, 1990.

"wines," and in part closely related to registrant's "liqueurs" inasmuch as they are both alcoholic beverages. Because neither applicant's nor registrant's identifications are limited in scope, we presume that their goods travel in the same channels of trade (e.g., liquor stores, wine stores, grocery stores), have the same methods of distribution and are purchased by the same classes of purchasers (general public, wine connoisseurs). See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).<sup>2</sup>

We next consider the similarities between the marks. Specifically, we consider whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. In cases such this case, where the applicant's goods are identical in part to the registrant's

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<sup>2</sup> Applicant has argued that registrant actually uses its mark on "liqueur" rather than on "wine." Applicant's argument is legally irrelevant - it is well settled that in Board proceedings, "the question of likelihood of confusion must be determined based on an analysis of the marks as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the cited registration], rather than what the evidence shows the goods and/or services to be." *Id.*

Further, because we are limited in what we may consider by the identifications of goods in the application and the cited registration, applicant's other arguments regarding pricing, the "roles" of wine and liqueur, the alcohol content of wines and liqueur, geographical origin, "grape variety," consumer care, and sophistication of consumers, are also legally irrelevant.

goods, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical.

*Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

The cited mark consists of the term CAPELLA and applicant's mark includes the term CAPPELLA. The only difference between these two terms is an additional "p" in CAPPELLA. The additional "p" does not change the pronunciation or sound of CAPELLA, and applicant has not contended otherwise. Further, the additional "p" changes the appearance of CAPELLA only slightly, and insignificantly. In all likelihood, purchasers will not even notice this difference. Additionally, the record does not reflect that CAPELLA or CAPPELLA has any meaning or significance when used in connection with "wine."<sup>3</sup> Thus, CAPELLA and CAPPELLA are both arbitrary as used in connection with the parties' goods, and the connotation of the terms is the same. We therefore find that CAPELLA and CAPPELLA are identical in sound and connotation, and

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<sup>3</sup> Applicant notes that he selected his mark "from a chapel located in his vineyard, as well as an arch on that property bearing the inscription "CAPELLA." We take judicial notice of one meaning of CAPPELLA, i.e., "chapel." Collins Italian Dictionary (1995). See *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330 (CCPA 1953); and TBMP 1208.01 (2d ed. rev. 2004).

virtually identical in appearance. Further, because the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather the focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks, see *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975), and because CAPELLA and CAPPELLA are identical or virtually identical in sound, connotation and appearance, we also find that CAPELLA and CAPPELLA are identical in their commercial impression.

Applicant's mark also contains the terms ABREU VINEYARDS. ABREU is applicant's surname and is also the mark registered in Registration No. 2325747.<sup>4</sup> (Applicant has claimed ownership of Registration No. 2325747 in the present application.) VINEYARDS, according to applicant, is a generic term, see p. 9 of applicant's appeal brief, which we note has been disclaimed by applicant. When applicant's registered surname is combined with the generic term "vineyards," the wording "Abreu Vineyards" is likely to be perceived by consumers, in connection with wines, as

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<sup>4</sup> Registration No. 2325747 registered to David Abreu on March 7, 2003 for "wine." The registration claims acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f).

a unitary phrase and as a house mark or "family mark,"<sup>5</sup> identifying the name of the winery that is the source of applicant's wine. Moreover, considering the mark as a whole, CAPPELLA is likely to be perceived as indicating a variety of wine, i.e., "Cappella wine from Abreu Vineyards, a winery."

Additionally, we have stated in the past that "[w]here the marks are otherwise virtually the same, the addition of a house mark or, as in this case, a surname, is more likely to add to the likelihood of confusion than to aid to distinguish the marks." *Key West Fragrance & Cosmetic Factory, Inc. v. The Mennen Company*, 216 USPQ 168, 170 (TTAB 1982). In view thereof, and because CAPPELLA is an arbitrary term in the context of wine, we find that the addition of ABREU VINEYARDS has the effect of increasing the likelihood of confusion between the cited mark CAPELLA and the term CAPPELLA in applicant's mark.<sup>6</sup>

Applicant has contended that there are "numerous co-existing marks"; and that "the trademark field already is

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<sup>5</sup> Applicant has acknowledged that ABREU is a house mark or "family mark." See p. 6 of applicant's response (filed February 9, 2004) to the examining attorney's first Office Action and p. 11 of applicant's appeal brief.

<sup>6</sup> As a general rule, one may not adopt another's mark in its entirety and escape a finding of likelihood of confusion simply by adding his house mark. J. McCarthy, *McCarthy on Trademarks and Unfair Competition*, Section 23:43 (4th ed. 2005).

diluted and 'consumers will not likely be confused between any two of the crowd ....' " Applicant relies on the cited registration for CAPELLA and Registration No. 2641632 for CAPELLO for "wine," which the examining attorney also relied on in first refusing registration of applicant's mark under Section 2(d) (she later withdrew the refusal).<sup>7</sup> These two registrations are insufficient to show that CAPPELLA lacks distinctiveness in connection with wine.

Applicant further argues that he has no intent to trade on any goodwill associated with the cited mark. Because we have sustained the examining attorney's objection to the untimely submission of applicant's evidence with applicant's appeal brief, see discussion in footnote 7, applicant has no evidentiary support which we may consider for his argument. Moreover, good faith

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<sup>7</sup> Applicant also relies on one trademark application, i.e., application Serial No. 78232186 for ACAPPELLA "for use with wine." Because a copy of this application is not in the record, we do not give the application or applicant's arguments relating thereto any consideration. See TMEP Section 710.03. Further, the examining attorney has objected to the evidence first filed with applicant's appeal brief, including the "list of names appearing on a 'BATF search'" and the declarations of Caroline Mead (who is applicant's attorney) and David Abreu. See p. 9 of examining attorney's brief. We sustain the examining attorney's objection to the untimely submission of this evidence and we have not given any consideration to this evidence. See Trademark Rule 2.142(d); and TBMP § 1207.03 (2d ed. rev. 2004) and cases cited therein.

adoption does not obviate a likelihood of confusion. See *McDonald's Corp. v. McClain*, 37 USPQ2d 1274 (TTAB 1995).

In view of the foregoing, mindful that where the marks appear on identical and closely related goods, the degree of similarity necessary to support a conclusion of likely confusion declines, *Century 21 Real Estate Corp. v. Century Life of America*, *supra*, and considering all of the relevant *du Pont* factors, we conclude that consumers familiar with registrant's wine and liqueur offered under the mark CAPPELLA would be likely to believe, upon encountering applicant's mark ABREU VINEYARDS CAPELLA, also for wine, that both originate with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.